No. 20-690

In the Supreme Court of the United States

MICHAEL SANG HAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in admitting evidence that petitioner made misrepresentations to investors about his company's economic prospects and the activities for which the investors' funds would be used.

2. Whether the court of appeals correctly determined that, in the circumstances of petitioner's trial, any error in the district court's jury instruction on petitioner's theory of his defense was harmless.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

United States v. *Han*, No. 15-cr-142 (Oct. 17, 2018)

United States Court of Appeals (D.C. Cir.):

United States v. *Han*, No. 18-3081 (June 19, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 962 F.3d 568.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on June 19, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on November 13, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on two counts of willfully attempting to evade or defeat federal taxes, in violation of 26 U.S.C. 7201. Pet. App. 15a. Petitioner was sentenced to 48 months of imprisonment, to be followed by 36 months of supervised release. *Id.* at 17a-18a. The court of appeals affirmed. *Id.* at 1a-12a.

1. Petitioner was the founder, sole owner, and chief executive of Envion, Inc., a company purportedly engaged in developing recycling technologies. Pet. App. 2a; Gov't C.A. Br. 2-3. After incorporating Envion in 2004, petitioner began seeking outside investments in the company, telling potential investors that Envion owned the rights to a technology for converting plastic waste into oil. See *ibid.*; Gov't C.A. Supp. App. SA30-SA31, SA96. The company, however, "never sold any recycling technology and never earned any revenue." Pet. App. 2a.

Petitioner succeeded in securing millions of dollars in investments in Envion, including from former Secretary of Defense Frank Carlucci, many in the form of loans to the company documented by promissory notes. Pet. App. 2a-3a; see Gov't C.A. Br. 4-5; Gov't C.A. Supp. App. SA87-SA90, SA97-SA103. From 2004 to 2009, petitioner spent $7 million in funds invested in Envion on his personal expenses, including high-end sports cars. Pet. App. 2a; see Gov't C.A. Br. 7; Gov't C.A. Supp. App. SA130-SA131. For those years, he did not timely file individual or corporate tax returns. Pet. App. 2a.

In 2010, after receiving a notice from the Internal Revenue Service regarding the missing tax returns, petitioner worked with his accountants to prepare returns

for those prior years. See Pet. App. 2a; Gov't C.A. Supp. App. SA148-SA149; Gov't C.A. Br. 33. In doing so, petitioner learned from his accountants that the millions of dollars of company funds that he had spent on personal expenses had to be characterized either as compensation to petitioner, which would be taxable, or as shareholder loans to petitioner, which would not be taxable but that he would be obligated to repay. Pet. App. 2a-3a; see Gov't C.A. Br. 7-8. Petitioner elected the latter option, treating those expenditures as nontaxable shareholder loans. Pet. App. 3a. Envion's 2009 tax return accordingly reported a cumulative shareholder-loan balance owed by petitioner to the company in excess of $7 million. See Pet. C.A. App. A400. That return also reported that Envion owed more than $15 million to Carlucci and another investor, James Russell, on outstanding loans they had made to the company, which were documented by promissory notes from Envion. *Ibid.*; see, *e.g.*, Pet. App. 54a-60a, 78a-85a.

At around the same time, petitioner solicited millions of dollars of additional funds from Carlucci and Russell, telling them that the funds were needed for an "[i]nvestment deal for Envion" that was "imminent." Gov't C.A. Supp. App. SA59; see *id.* at SA70-SA71, SA104. Carlucci and Russell agreed to invest an additional $20 million and $2.3 million, respectively, in Envion. *Ibid.*; Pet. App. 3a; see Gov't C.A. Br. 9-11. Carlucci and Russell believed that they were loaning the money to Envion, not to petitioner personally. See Pet. App. 3a, 10a n.2; Gov't C.A. Supp. App. SA71-SA73, SA114-SA115. Petitioner, however, had the funds wired to his personal accounts. Pet. App. 3a. He initially documented the new 2010 investments with promissory notes that named petitioner, rather than Envion, as the borrower, but that

otherwise resembled loans to a corporate entity. See *id.* at 47a-54a, 71a-78a (listing the borrower as "the Individual," *i.e.*, petitioner, but providing that investors could convert the notes into stock in "the Individual" and stating that the note was executed on behalf of "the Individual * * * by its duly authorized officers"). Petitioner later provided both Carlucci and Russell with global promissory notes that listed Envion as the borrower for all of their respective investments, including the 2010 payments. *Id.* at 61a-70a, 86a-93a; Gov't C.A. Br. 14-15.

Petitioner did not inform Envion's accountants about the additional loans in 2010 from Carlucci and Russell. D. Ct. Doc. 173, at 86-87 (Oct. 19, 2018). Instead, he misappropriated millions of dollars of the newly obtained funds for his personal use. Pet. App. 3a. Among other things, petitioner paid off a portion of his outstanding shareholder-loan balance owed to Envion; purchased and renovated a Palm Beach home; and bought a Ferrari. *Ibid.*; Gov't C.A. Supp. App. SA167-SA180, SA198-SA202. Petitioner filed individual tax returns for 2010 and 2011, but those returns did not report the misappropriated funds as income. Pet. App. 3a.

In 2012, Carlucci sued petitioner and Envion. Pet. C.A. App. A194, A254; Gov't C.A. Supp. App. SA112. Petitioner and Envion filed a joint answer to the amended complaint in that proceeding, in which they admitted that Carlucci had "provided $20 million to Envion in exchange for a promissory note," and that in 2011 the "promissory note from Envion" was "rolled into one promissory note." Pet. C.A. App. A254-A255. Envion "admit[ted] that it ha[d] not paid $32,393,000"—the debt recited in that global note—"to Mr. Carlucci," and the answer stated that petitioner "[wa]s not a party to th[at] promissory

note." *Id.* at A255. A default judgment was later entered against petitioner. *Id.* at A194-A195.

2. A federal grand jury in the District of Columbia returned a superseding indictment charging petitioner (as relevant) with two counts of willfully attempting to evade and defeat federal taxes, in violation of 26 U.S.C. 7201. Pet. C.A. App. A66-A70. Petitioner pleaded not guilty and proceeded to trial. *Id.* at A15; Pet. App. 15a.

The central dispute at trial was whether the 2010 loans extended by the investors were loans to Envion or to petitioner personally. The government's theory of the case was that the loans had been extended to Envion; that petitioner misappropriated corporate funds when he spent the loan proceeds on personal expenditures (including to repay a portion of his shareholder-loan balance); and that such spending of corporate funds on personal expenditures constituted taxable income that petitioner had willfully failed to report on his 2010 and 2011 returns. See Gov't C.A. Br. 18. Petitioner's principal defense was that he did not willfully fail to report those expenditures as income because he believed that Carlucci and Russell had loaned the $22 million to petitioner personally, rather than to Envion, and as the borrower he was not required to report the loan proceeds as income. Pet. App. 3a.

Petitioner and the government did not dispute at trial the proposition that the proceeds of a bona fide loan are not taxable income, nor did they dispute the characteristics of a bona fide loan. Instead, they disputed whether the loans had been extended to Envion or instead to petitioner himself. Both parties presented expert testimony addressing various factors to be considered in determining whether a bona fide loan to petitioner existed, including whether he had the ability to

repay a given loan. See Pet. App. 35a-38a, 45a, 94a–96a; D. Ct. Doc. 176, at 28-29, 32-33, 68-70 (Oct. 19, 2018).

Petitioner did not propose an instruction stating that loans are not taxable income, an instruction defining a nontaxable loan, or an instruction articulating or otherwise delimiting the factors that the jury could consider in determining whether the loans were extended to petitioner personally rather than to Envion. See Pet. C.A. App. A276-A289, A295-A316. Petitioner did request a theory-of-defense jury instruction that included a statement that petitioner "believed that the funds he received in 2010 could legally be treated as non-taxable personal loans." *Id.* at A276. The district court gave a theory-of-defense instruction, but it declined to include that precise language, stating that, because petitioner had not testified, "we don't know what he believed." *Id.* at A295-A296; see *id.* at A296 (court stating that "I don't think I can put what he believed because I don't have any evidence"). Instead, the theory-of-defense instruction stated:

> The defense theory of the case is that there was a reasonable basis not to report the funds [petitioner] received in 2010 as taxable income in the years charged. He did in good faith rely on the advice he received from accounting and tax professionals in filing his tax returns. As a result, he did not act with the intent to violate the law.

Id. at A327; see *id.* at A296-A299.

The jury found petitioner guilty on both counts. Pet. App. 15a. The district court sentenced him to 48 months of imprisonment. *Id.* at 17a.

3. The court of appeals affirmed. Pet. App. 1a-12a.

Petitioner contended on appeal that the district court had abused its discretion by admitting certain

"evidence that [petitioner] made misrepresentations to investors about Envion's economic prospects." Pet. App. 7a. In particular, petitioner argued that the court should not have allowed evidence that he had lied to the investors about the existence of the supposedly imminent deal for which he told investors the 2010 loans were necessary—specifically, evidence that petitioner had not executed certain agreements on behalf of Envion, and testimony that a purported Envion project was much further from completion than petitioner had indicated to investors. Pet. C.A. Br. 29-30. Petitioner acknowledged "that the government was entitled to dispute" petitioner's "characterization" of the 2010 loans as having been made "to him personally, rather than to Envion," using "evidence of how Carlucci and Russell thought the funds would be used." Pet. App. 7a. But he contended that, "while the representations that Carlucci and Russell relied on in wiring money to [petitioner] were relevant, evidence that these statements were *mis*representations was not" relevant. *Ibid.* (quoting Pet. C.A. Br. 28) (brackets omitted). He further argued that such evidence, if it were relevant, should have been excluded under Federal Rules of Evidence 403 and 404(b). Pet. C.A. Br. 28-30.

The court of appeals rejected those contentions. Pet. App. 7a-8a. The court stated that "[w]hether a borrower has the intent and ability to repay a purported loan is a factor in judging whether the transaction is in fact a loan for tax purposes," and that "'loans obtained in bad faith and without an intent to repay them' are taxable income." *Id.* at 7a (quoting *United States* v. *Swallow*, 511 F.2d 514, 519 (10th Cir.), cert. denied, 423 U.S. 845 (1975)); see *id.* at 7a-8a (citing *United States* v. *McGinn*,

787 F.3d 116, 126-127 (2d Cir. 2015), and *Welch* v. *Commissioner*, 204 F.3d 1228, 1230 (9th Cir. 2000)). The court explained that, in this case, the government "introduced the challenged evidence to show that [petitioner] knew the deals he told the investors would be the source of their repayment would never be consummated—and hence that the investors' money could not have constituted loans to [petitioner] because he had no intent or ability to repay them." *Id.* at 8a. The court additionally noted that the district court had "t[aken] exemplary care to insist that testimony on this subject be 'brief' and 'very tailored,' and 'to limit how the government could argue' the evidence in its closing," thus minimizing "the danger of unfair prejudice." *Ibid.* (brackets and citation omitted).

Petitioner separately contended that the district court had erred in "failing to instruct the jury that personal loans are not income" and in omitting from its theory-of-defense instruction the precise statement—that petitioner "'believed that the funds he received in 2010 could legally be treated as non-taxable personal loans'"—that he had requested. Pet. C.A. Br. 39-40 (capitalization altered; citation and emphases omitted); see *id.* at 39-47. The court of appeals noted the government's acknowledgment that the district court's stated reason for omitting that requested statement—that there was no evidence in the record of what he believed—"was not a valid basis for refusing to include that statement." Pet. App. 9a. The court of appeals additionally noted that, "although the remainder of the instruction made clear that [petitioner] was mounting a defense based on his claimed good-faith belief, it did not include the point that loans are not taxable." *Id.* at 9a-10a.

The court of appeals determined, however, that "any error" regarding the challenged instruction "was harmless." Pet. App. 10a. The court found that, "'[i]n light of all the circumstances—the language of the instructions, the arguments of counsel, and the evidence itself'—there was no real risk of confusion about [petitioner's] theory of the case or its legal basis." *Ibid.* (citation omitted). It observed that both the government's and petitioner's expert witnesses had testified that personal loans are not taxable, and petitioner's counsel had "stressed during closing arguments" that "there was no disagreement on [that] point." *Ibid.* The court additionally noted petitioner's acknowledgment that "'the incredibility of a defendant's claim that he considered the transactions to be loans' can provide a basis to find the failure to instruct harmless." *Ibid.* (brackets and citations omitted). The court found that his "claim that the $22 million from Carlucci and Russell were personal loans to him * * * f[ell] well within the 'incredible' category," citing evidence that the investors did not make—and would not have agreed to make—loans totaling $22 million to petitioner personally, as well as petitioner's admissions in the civil suit filed by Carlucci. *Ibid.*; see *id.* at 10a n.2.

ARGUMENT

Petitioner contends (Pet. 9, 18, 22-23) that the district court committed reversible error in admitting at trial certain evidence that petitioner made misrepresentations to investors about his company's economic prospects and the activities for which the funds the investors provided would be used. Petitioner additionally contends (Pet. 9-10, 19-20, 23) that the court erred in instructing the jury on his theory of his defense. The court of appeals correctly rejected those contentions,

finding that the district court had not abused its discretion in admitting the disputed evidence and that, in the circumstances of this case, any error in the jury instruction was harmless. Those factbound determinations do not conflict with any decision of this Court or of another court of appeals.

Petitioner nevertheless urges (Pet. 1-2) this Court to review the decision below, asserting that it conflicts with *James* v. *United States*, 366 U.S. 213 (1961), and implicates an existing lower-court conflict, by adopting an erroneous "test for distinguishing taxable income from non-taxable loan proceeds." See Pet. 10-21. Those assertions lack merit. The court of appeals did not pass upon the legal standard for distinguishing nontaxable loans from taxable income. Petitioner did not raise that issue, and the court had no need to resolve it in addressing petitioner's claims of case-specific error. The decision below does not conflict with *James* or implicate any substantive disagreement among the courts of appeals on the definition of nontaxable loans, and this case would be an unsuitable vehicle for addressing that issue. Further review is not warranted.

1. The court of appeals correctly determined that the district court did not abuse its discretion in admitting certain evidence that petitioner made misrepresentations to investors about the activities for which he was soliciting additional investments. Pet. App. 7a-8a.

Petitioner's "principal defense was the claim that Carlucci and Russell had loaned $22 million to him personally, rather than to Envion." Pet. App. 7a. As the court of appeals recognized, whether petitioner had the "intent" to repay those funds is highly relevant in determining whether they represented nontaxable loan proceeds or taxable income. *Id.* at 7a-8a. Petitioner

himself argues that taxable income excludes only "bona fide loan proceeds" and that "the transacting parties' intent to adopt a repayment obligation is the 'sine qua non of a bona fide non-reportable loan.'" Pet. 12-13 (citation omitted). The court properly determined that the evidence petitioner sought to exclude was relevant because it bore on the existence of such intent.

The disputed evidence consisted of testimony indicating that the purportedly "imminent" "[i]nvestment deal for Envion" for which petitioner had solicited more than $22 million in additional funds from investors was not as advertised. Gov't C.A. Supp. App. SA59. The government introduced that testimony "to show that [petitioner] knew the deals he told the investors would be the source of their repayment would never be consummated." Pet. App. 8a. Petitioner's knowledge that he could not repay the money solicited from investors from the intended revenue source, combined with his lack of "independent money" from which to repay the investors, would tend to negate petitioner's defense that he intended to repay the money. *Ibid.* (citation omitted). If credited, the testimony was thus relevant to the issue of intent.

As the court of appeals additionally noted, the district court "took exemplary care" with this evidence to avoid creating a "danger of unfair prejudice," by narrowly limiting both the evidence and related argument the government could present. Pet. App. 8a. The court of appeals correctly found that the district court did not abuse its discretion, and that case-specific evidentiary ruling does not warrant further review.

2. The court of appeals also correctly determined that any error in the district court's jury instruction on petitioner's theory of his defense was harmless and did

not warrant reversal of his conviction. Pet. App. 9a-10a. And that factbound, record-specific ruling similarly does not warrant this Court's view.

Petitioner requested a statement in the theory-of-defense instruction that he "believed that the funds he received in 2010 could legally be treated as non-taxable personal loans." Pet. C.A. Br. 40 (quoting Pet. C.A. App. A276) (emphasis omitted). The district court's instruction did not include that particular statement. But it did make clear that petitioner's "theory of the case" was that "a reasonable basis" existed for not reporting the 2010 funds as taxable income, and that petitioner had "in good faith rel[ied] on the advice he received from accounting and tax professionals" and thus "did not act with the intent to violate the law." Pet. C.A. App. A327.

Petitioner contended below that the omitted statement would also have conveyed that "the 2010 funds 'could legally be treated' as personal loans" and that "personal loans are 'non-taxable.'" Pet. C.A. Br. 40. The court of appeals acknowledged that, although the instruction given made clear that petitioner "was mounting a defense based on his claimed good-faith belief," it "did not include the point that loans are not taxable." Pet. App. 9a-10a. But the court properly found any error in the omission of that point to be harmless on the record of this case. *Id.* at 10a. As the court explained, "'[i]n light of all the circumstances,'" including the specific "'language of the instructions, the arguments of counsel, and the evidence itself,'" "no real risk" existed that the jury would be "confus[ed] about [petitioner's] theory of the case or its legal basis." *Ibid.* (citation omitted). Both parties' experts had testified that personal loans are not taxable, and petitioner's

counsel had "stress[ed] during closing arguments" that the point was undisputed by the parties. *Ibid.*

In addition, as the court of appeals further explained, any error in that instruction was harmless for the independent reason that petitioner's "claim that the $22 million from Carlucci and Russell were personal loans to him" was "'incredible.'" Pet. App. 10a. Petitioner himself acknowledged that "'the incredibility of a defendant's claim that he considered the transactions to be loans'" can provide a freestanding "basis to find the failure to instruct harmless." *Ibid.* (brackets and citations omitted). And in this case, as the court observed, ample evidence showed that petitioner's claim lay far outside the bounds of plausibility: petitioner had issued superseding, global promissory notes to both Carlucci and Russell making clear that the $22 million had been loaned to Envion, not to petitioner personally; petitioner had admitted as much with respect to the $20 million Carlucci contributed in a pleading in separate civil litigation that Carlucci commenced; and testimony by Russell and by Carlucci's wife (Carlucci was too ill to testify himself) showed that neither investor would have made personal loans to petitioner in those amounts. *Id.* at 10a-11a n.2. The court correctly determined that any error was harmless.

3. In this Court, petitioner devotes nearly all of his argument to contending that the court of appeals adopted an erroneous "test for distinguishing taxable income from non-taxable loan proceeds." Pet. 1; see Pet. 1-2, 10-21. He argues that "the proper test focuses on the parties' intent at the time of the transaction," and "other factors" may be considered "only as a means of ascertaining intent." Pet. 1. Petitioner contends (Pet.

1-2, 10-21) that the court of appeals rejected that understanding and that its decision conflicts with this Court's precedent and other circuits' decisions. Those contentions lack merit and do not warrant further review.

a. Petitioner's assertions (Pet. 1-2, 10-21) that the decision below conflicts with this Court's precedent and with decisions of other courts of appeals all rest on the mistaken premise that the court of appeals articulated a particular legal standard for distinguishing nontaxable loans from taxable income. The court made no such pronouncement in this case. Petitioner did not raise that issue on appeal, and the court had no occasion to address it in adjudicating the case-specific claims of error that petitioner did present.

As the court of appeals recounted, petitioner challenged his conviction on appeal on four case-specific grounds: "(1) the district court admitted evidence that was irrelevant and improperly showed prior 'bad acts'; (2) the government improperly appealed to 'class prejudice' throughout the trial; (3) the district court erred in declining to give [petitioner's] preferred theory-of-the-defense instruction; and (4) his trial counsel was ineffective." Pet. App. 4a; see Pet. C.A. Br. 16-57. None of those factbound challenges asked the court of appeals to pass upon the legal definition of nontaxable loans or required it to do so. And consistent with the scope of petitioner's arguments on appeal, the court of appeals did not resolve that issue or articulate any global statement of the governing test. It simply rejected his case-specific claims asserting evidentiary and instructional errors, allegedly improper efforts by the government at trial to exploit class prejudice, and ineffective assistance of his trial counsel. See Pet. App. 4a-12a.

Petitioner points (Pet. i, 2, 18, 22) to one brief passage in the court of appeals' opinion—in the portion rejecting his contention that the district court erred in admitting evidence about his misrepresentations to investors—that he argues adopted a test for identifying nontaxable loans. In that passage, the court stated that "[w]hether a borrower has the intent and ability to repay a purported loan is a factor in judging whether the transaction is in fact a loan for tax purposes." Pet. App. 7a. The court then quoted a decision of the Tenth Circuit for the proposition that "'loans obtained in bad faith and without an intent to repay them' are taxable income," *ibid.* (quoting *United States* v. *Swallow*, 511 F.2d 514, 519, cert. denied, 423 U.S. 845 (1975)), and it cited decisions of the Second and Ninth Circuits as supporting the same principle. See *id.* at 7a-8a (citing *United States* v. *McGinn*, 787 F.3d 116, 126-127 (2d Cir. 2015), and *Welch* v. *Commissioner*, 204 F.3d 1228, 1230 (9th Cir. 2000)). Applying that principle, the court of appeals found that the evidence of petitioner's misrepresentations was relevant to showing that petitioner "had no intent or ability to repay" the 2010 loans from the investors, because they established that petitioner "knew the deals he told the investors would be the source of their repayment would never be consummated," and he had no other, "'independent'" resources with which to repay them. *Id.* at 8a (citation omitted).

Petitioner errs (Pet. i, 1, 10, 23) in portraying that passage as embracing a "shapeless" "multi-factor balancing test." Petitioner seizes (Pet. 20) on the court of appeals' allusion to a borrower's "intent *and* ability to repay," which he describes (Pet. 18) as placing another consideration (a borrower's ability to repay) "on equal footing" with intent to do so. See Pet. 22. But the

court's analysis of that consideration here suggests that it may have viewed a borrower's ability to repay in the manner petitioner approves: not as a freestanding element independent of intent to repay, but as an "indication[] of intent." Pet. 1 (citation omitted). The court found that the government's evidence of petitioner's misrepresentations regarding the supposedly imminent deal to investors was pertinent because it showed that petitioner knew he would have no ability to repay the purported loans; it thus would tend to show that petitioner obtained the loans with no intention to repay them. The passing conjunctive phrase petitioner cites did not endorse a comprehensive definition of nontaxable loans.

Nor did the court of appeals' application of the proposition that intent to repay is relevant (Pet. App. 8a) embody a complete definition of nontaxable loans, much less endorse the freeform inquiry petitioner imputes to the court's opinion. The court had no need to adopt such a definition to determine that the evidence petitioner challenged in this case was properly admitted. Regardless of which (if any) considerations other than intent to repay might also be properly considered in distinguishing nontaxable loans from income, intent is at least a relevant consideration. In light of its finding that the evidence of petitioner's misrepresentations was probative of his intent to repay, the court correctly found that the district court did not abuse its discretion in admitting that evidence.

Petitioner similarly errs in contending (Pet. 15, 18) that the court of appeals' citation of decisions of other circuits that petitioner disapproves reflects the court's adoption of an "open-ended," "amorphous" approach to identifying nontaxable loans that petitioner imputes to

those other circuits. In the same breath, the court also cited a decision of the Second Circuit, which petitioner contends (Pet. 15) follows the approach he advocates, under which intent to repay is the touchstone, with other criteria potentially relevant only as "indicia of intent." See Pet. App. 7a-8a (citing *McGinn*, 787 F.3d at 126-127). The court of appeals' citation of other decisions does not support petitioner's inference that the court tacitly adopted a freeform definition of nontaxable loans.

At bottom, petitioner's reading of the decision below would turn that decision on its head. The court of appeals rejected petitioner's evidentiary claims *because* the evidence was relevant to his intent to repay, not despite the absence of such intent. Petitioner agrees that intent to repay is highly relevant; indeed, in his view, it is necessary for a payment to be deemed a nontaxable loan. See Pet. 10-13, 18-21. The decision below is thus wholly consistent with petitioner's arguments about the definition of a nontaxable loan.

b. Petitioner's contention (Pet. 2, 18-21) that the decision below conflicts with this Court's decision in *James* v. *United States*, *supra*, by adopting a "multifactor balancing test" (Pet. 2) accordingly lacks merit because the court of appeals' decision adopted no such standard. That contention also fails for the independent reason that petitioner overreads *James*.

James did not involve the classification of a payment as a nontaxable loan rather than taxable income. The case instead presented the question "whether embezzled funds are to be included in the 'gross income' of the embezzler." 366 U.S. at 213. The plurality answered that question in the affirmative. See *id.* at 215-222.

The plurality in *James* observed that the Court had previously held in *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946), that "embezzled money does not constitute taxable income to the embezzler," on the ground that an embezzler has no "'bona fide claim of right'" to the embezzled funds and has "'an unqualified duty and obligation to repay the[m].'" *James*, 366 U.S. at 215-216 (quoting *Wilcox*, 327 U.S. at 408). But the plurality in *James* determined that *Wilcox* "was wrongly decided," had been "thoroughly devitalized" and "vitiated" by intervening decisions, and was not supported by congressional intent. *Id.* at 215, 217, 221; see *id.* at 215-221. The plurality explained that "[i]t had been a well-established principle, long before * * * *Wilcox*, that unlawful, as well as lawful, gains are comprehended within the term 'gross income,'" and that "the purpose of Congress" in employing that phrase "was 'to use the full measure of its taxing power.'" *Id.* at 218-219 (citation omitted); see *id.* at 241 (Clark, J., concurring in part and dissenting in part) ("join[ing] in the specific overruling of [*Wilcox*]"); *id.* at 241-242 (Harlan, J., joined by Frankfurter, J., concurring in part and dissenting in part) (similar).

In the passage on which petitioner relies (Pet. 2, 4, 12, 18), the plurality in *James* then stated:

> When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent. In such case, the taxpayer has actual command over the property taxed—the actual benefit for which the tax is paid. This

> standard brings wrongful appropriations within the broad sweep of "gross income"; it excludes loans.

366 U.S. at 219 (citations and internal quotation marks omitted).

To the extent that passage was intended to address the definition of nontaxable loans, which was not directly at issue, it at most described a "consensual recognition, express or implied, of an obligation to repay" as a necessary condition for earnings to be deemed a nontaxable loan, 366 U.S. at 219 (plurality opinion), not as a sufficient condition. Nor did the plurality in *James* elaborate on the meaning of such a "consensual recognition" of an "obligation to repay" or "loans," *ibid.*, let alone define those terms in a manner that would foreclose consideration of any factor other than intent to repay. Indeed, a pre-*James* decision that *James* did not address had previously approved considering multiple factors in evaluating whether a transaction constitutes a bona fide loan. See *John Kelley Co.* v. *Commissioner*, 326 U.S. 521, 526 (1946) (reviewing the "indicia of indebtedness" consisting of certain "characteristics" of the "obligations in question" and the "surrounding circumstances" to determine whether the payments were deductible interest or nondeductible dividends); 1 *Mertens Law of Federal Income Taxation* § 5A:27 & n.2 (Carina Bryant ed., Jan. 2021 update) (discussing multiple "objective criteria" courts consider and citing *John Kelley* as supporting that approach).

4. a. Even assuming that the decision below took a position on the issue, petitioner errs in contending (Pet. 13-18) that review would be warranted in this case to resolve a lower-court conflict regarding the proper approach for distinguishing taxable loans from nontaxable income. As explained above, the court of appeals did not

articulate any specific test governing that question. See pp. 14-17, *supra*. Petitioner significantly overstates the differences among the approaches courts of appeals apply in identifying nontaxable loans.

The circuits whose decisions petitioner cites all apply a broadly similar approach to one another. All of them recognize that the intent of the parties that the borrower will repay the money is central in determining whether the transaction is a nontaxable loan. See *Crowley* v. *Commissioner*, 962 F.2d 1077, 1079 (1st Cir. 1992); *Collins* v. *Commissioner*, 3 F.3d 625, 631 (2d Cir. 1993); *Commissioner* v. *Makransky*, 321 F.2d 598, 600 (3d Cir. 1963); *United States* v. *Pomponio*, 563 F.2d 659, 662 (4th Cir. 1977), cert. denied, 435 U.S. 942 (1978); *Estate of Mixon* v. *United States*, 464 F.2d 394, 406-407 (5th Cir. 1972); *Jaques* v. *Commissioner*, 935 F.2d 104, 107 (6th Cir. 1991); *Busch* v. *Commissioner*, 728 F.2d 945, 948 (7th Cir. 1984); *Welch*, 204 F.3d at 1230; *Williams* v. *Commissioner*, 627 F.2d 1032, 1034-1035 (10th Cir. 1980). At the same time, those courts recognize that a court should consider various "objective factors" beyond a putative borrower's testimony in ascertaining that intent—including the economic substance of the transaction and other "objective facts" that may contradict the borrower's stated subjective intentions. *Busch*, 728 F.2d at 948; see *Crowley*, 962 F.2d at 1079; *Todd* v. *Commissioner*, 486 Fed. Appx. 423, 426 (5th Cir. 2012) (per curiam); *Jaques*, 935 F.2d at 107; *Welch*, 204 F.3d at 1230; *Williams*, 627 F.2d at 1034-1035.

Any tension in the language of the lower courts' decisions concerns the characterization of the role of those other, objective factors in the analysis. Some cases describe other factors as "indications of intent." *Busch*, 728 F.2d at 948; see, *e.g.*, *Crowley*, 962 F.2d at 1079;

Jaques, 935 F.2d at 107. Others similarly emphasize that "self-serving declarations" of intent are insufficient and must be considered in light of other, "more reliable criteria of the circumstances surrounding the transaction" to determine the intended nature of an arrangement. *Estate of Mixon*, 464 F.2d at 407 (citation omitted); see, *e.g.*, *Williams*, 627 F.2d at 1034-1035. And others arguably have described factors other than direct evidence of intent as separate considerations in determining whether a purported loan is "bona fide." *Welch*, 204 F.3d at 1230; see, *e.g.*, *Merck & Co.* v. *United States*, 652 F.3d 475, 480-486 (3d Cir. 2011) (expressing doubt as to "whether the intent of the parties *by itself* is sufficient to create a loan, or whether that intent must also be reflected in the objective characteristics of the transaction in question," and accordingly "analyz[ing] both questions" and reaching the same result both ways).

Whatever label a court attaches to such other factors, petitioner has not shown that the substance of the circuits' approaches meaningfully differs. For example, he cites (Pet. 2, 16) the Ninth Circuit's decision in *Welch* as an archetypal example of a case applying an improper, "multi-factor balancing test" approach. But in that case, in reciting "factors" that other courts had deemed "relevant in assessing whether a transaction is a true loan," the court cited decisions of the First, Fourth, and Seventh Circuits—which in petitioner's view (Pet. 13-15) apply the intent-focused approach that he advocates. See *Welch*, 204 F.3d at 1230 (citing *Crowley*, 962 F.2d at 1079, *Frierdich* v. *Commissioner*, 925 F.2d 180, 182 (7th Cir. 1991), and *Piedmont Minerals Co.* v. *United States*, 429 F.2d 560, 563 (4th Cir. 1970)).

The decision below similarly cited both decisions from courts that petitioner argues apply the approach he disfavors and a decision from a circuit whose approach he endorses. See Pet. App. 7a-8a (citing *Swallow*, 511 F.2d at 519, *McGinn*, 787 F.3d at 126-127, and *Welch*, 204 F.3d at 1230). The court of appeals thus likely either perceived no material difference among those courts' articulations of the standard or recognized that any divergence was irrelevant to its decision here. Whether intent to repay is the sole criterion in deeming a payment to be a nontaxable loan or merely one factor among others to be considered has no bearing on the court of appeals' determination here in the passage on which petitioner relies: that the district court did not abuse its discretion by admitting evidence that was relevant to petitioner's intent to repay. *Ibid.* Either way, a borrower's intent is relevant to a material issue, and the evidence could properly be admitted.

b. Finally, this case would be an unsuitable vehicle to address broader questions of the definition of nontaxable loans for additional reasons.

Petitioner did not preserve in the district court any argument to which his current conception of the proper test for identifying nontaxable loans would be relevant. He did not, for example, request an instruction from the court defining a personal loan or identifying the indicia of intent that the jury could consider. See Pet. C.A. App. A276-A289, A295-A296. Any argument concerning the inadequacy of the jury instructions regarding the definition or identification of nontaxable loans thus would have been reviewable on appeal only for plain error. See *Jones* v. *United States*, 527 U.S. 373, 388 (1999); Fed. R. Crim. P. 52(b). Petitioner, however, did not present such an argument in the court of appeals

either. He contended that the jury instructions were erroneous for failing to apprise the jury that personal loans are nontaxable and that he believed the 2010 loans were made to him personally and so were not taxable income. See pp. 12-13, *supra*.

Moreover, petitioner could not have prevailed under a plain-error standard had he raised the issue on appeal. As the court of appeals found, his claim that the parties intended the 2010 investments to be personal loans to petitioner was "'incredible.'" Pet. App. 10a. Testimony showed that the investors did not and would not have made personal loans totaling $22 million to petitioner at that time. Global promissory notes encompassing the loans listed Envion, not petitioner, as the borrower, and petitioner admitted as much in separate civil litigation with respect to the larger ($20 million) of the two 2010 loans. See p. 13, *supra*; Pet. App. 10a n.2. Even if the jury had been instructed that the parties' intent that the borrower would repay a sum was the only relevant consideration in classifying that sum as a loan or taxable income, petitioner could not plausibly have demonstrated on the record of this case that the parties intended the 2010 investments to be personal loans to him. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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